

ONTARIO

Superior Court of Justice

(Name of court)

at 393 University Avenue, 10th floor, Toronto, Ontario, M5G 1E6
Court office addressCourt File Number
FS-11-367893

Form 10: Answer

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

V. [REDACTED]

L. [REDACTED]

Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

Martha McCarthy
Martha McCarthy & Company
146 Danenport Road
Toronto, ON M5R 1J2Tel: 416-862-6226
Fax: 416-862-9001
martha@mccarthyco.ca

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

Attorney General of Canada

Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).

Sean Gaudet
Senior Counsel
The Exchange Tower
130 King Street West, Suite 3400
Toronto, Ontario M5X 1K6Tel: (416) 973-0392
Fax: (416) 952-4518
E-mail: sean.gaudet@justice.gc.ca

Name & address of Children's Lawyer's agent for service (street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any)) and name of person represented.

INSTRUCTIONS: Financial Statement

COMPLETE A FINANCIAL STATEMENT (Form 13) IF:

- you are making or responding to a claim for spousal support; or
- you are responding to a claim for child support; or
- you are making a claim for child support in an amount different from the table amount specified under the Child Support Guidelines.

You must complete all parts of the form **UNLESS** you are **ONLY** responding to a claim for child support in the table amount specified under the Child Support Guidelines **AND** you agree with the claim. In that case, only complete Parts 1, 2 and 3.

COMPLETE A FINANCIAL STATEMENT (Form 13.1) IF:

- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents; or
- you are making or responding to a claim for property or exclusive possession of the matrimonial home and its contents together with other claims for relief.

TO THE APPLICANT(S):

If you are making a claim against someone who is not an applicant, insert the person's name and address here.

AND TO: (full legal name) _____ an added respondent,
of (address of added party) _____

My name is (full legal name) _____

1. I agree with the following claim(s) made by the applicant: (Refer to the numbers alongside the boxes on page 4 of the application form.)

None

2. I do not agree with the following claim(s) made by the applicant: (Again, refer to the numbers alongside the boxes on page 4 of the application form.)

00 - a divorce

30 - costs

3. I am asking that the applicant's claim (except for the parts with which I agree) be dismissed with costs.

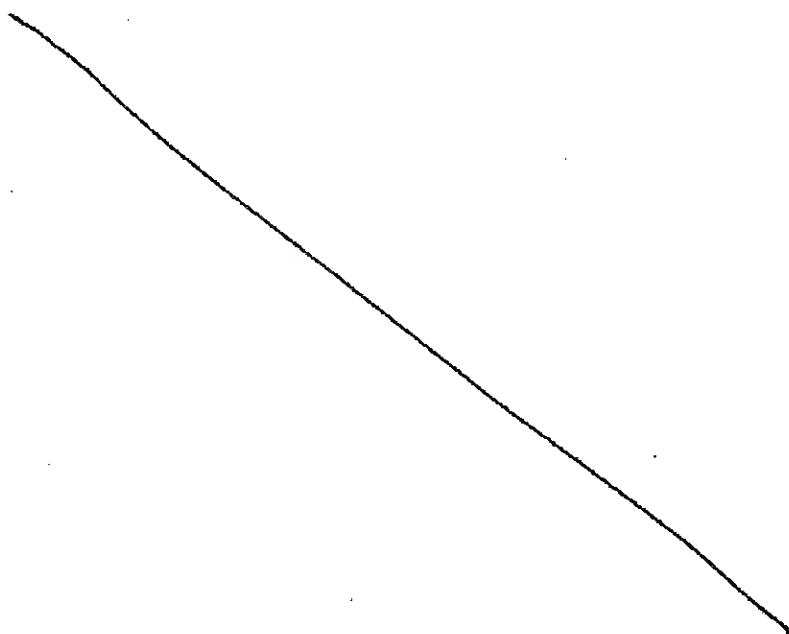
4. I am making a claim of my own.
(Attach a "Claim by Respondent" page and include it as page 3. Otherwise, do not attach it.)

5. The FAMILY HISTORY, as set out in the application is correct.
 is not correct.

(If it is not correct, attach your own FAMILY HISTORY page and underline those parts that are different from the applicant's version.)

6. The important facts that form the legal basis for my position in paragraph 2 are as follows:
(In numbered paragraphs, set out the facts for your position. Attach an additional sheet and number it if you need more space.)

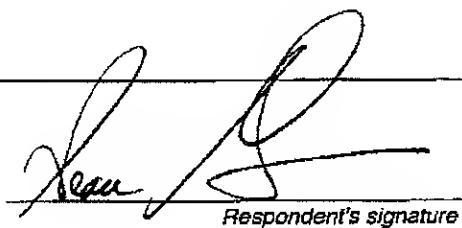
1. See attached Schedule A



Put a line through any blank space left on this page

June 17, 2011

Date of signature


Kean

Respondent's signature

CLAIM BY RESPONDENT

Fill out a separate claim page for each person against whom you are making your claim(s).

7. THIS CLAIM IS MADE AGAINST

THE APPLICANT
 AN ADDED PARTY, whose name is: (full legal name) _____
 (If your claim is against an added party, make sure that this person's name appears on page 1 of this form.)

8. I ASK THE COURT FOR THE FOLLOWING:

(Claims below include claims for temporary orders.)

Claims under the <i>Divorce Act</i>	Claims relating to property	Claims relating to child protection
(Check boxes in this column only if you are asking for a divorce and your case is in the Superior Court of Justice or Family Court of the Superior Court of Justice.)	(Check boxes in this column only if your case is in the Superior Court of Justice or Family Court of the Superior Court of Justice.)	
00 <input type="checkbox"/> a divorce 01 <input type="checkbox"/> support for me 02 <input type="checkbox"/> support for child(ren)-table amount 03 <input type="checkbox"/> support for child(ren)-other than table amount 04 <input type="checkbox"/> custody of child(ren) 05 <input type="checkbox"/> access to child(ren)	20 <input type="checkbox"/> equalization of net family properties 21 <input type="checkbox"/> exclusive possession of matrimonial home 22 <input type="checkbox"/> exclusive possession of contents of matrimonial home 23 <input type="checkbox"/> freezing assets 24 <input type="checkbox"/> sale of family property	40 <input type="checkbox"/> access 41 <input type="checkbox"/> lesser protection order 42 <input type="checkbox"/> return of child(ren) to my care 43 <input type="checkbox"/> place child(ren) into care of (name) 44 <input type="checkbox"/> children's aid society wardship for
		months
		45 <input type="checkbox"/> society supervision of my child(ren)
Claims under the <i>Family Law Act</i> or <i>Children's Law Reform Act</i>	Other claims	
10 <input type="checkbox"/> support for me 11 <input type="checkbox"/> support for child(ren)-table amount 12 <input type="checkbox"/> support for child(ren)-other than table amount 13 <input type="checkbox"/> custody of child(ren) 14 <input type="checkbox"/> access to child(ren) 15 <input type="checkbox"/> restraining/non-harassment order 16 <input type="checkbox"/> indexing spousal support 17 <input type="checkbox"/> declaration of parentage 18 <input type="checkbox"/> guardianship over child's property	30 <input type="checkbox"/> costs 31 <input type="checkbox"/> annulment of marriage 32 <input type="checkbox"/> prejudgment interest	
50 <input type="checkbox"/> Other (Specify.)		

Give details of the order that you want the court to make. (Include any amounts of support (if known) and the name(s) of the child(ren) for whom support, custody or access is claimed.)

IMPORTANT FACTS SUPPORTING MY CLAIM(S)

(In numbered paragraphs, set out the facts that form the legal basis for your claim(s). Attach an additional page and number it if you need more space.)

[A large, diagonal line has been drawn through the entire left side of the page, from the top left corner towards the bottom right.]

Put a line through any blank space left on this page.

June 17, 2011

Date of signature

[A horizontal line with a large black redaction box covering the signature area.]

Respondent's signature

LAWYER'S CERTIFICATE

For divorce cases only

My name is Sean Gaudet

and I am the respondent's lawyer in this divorce case. I certify that I have complied with the requirements of section 9 of the Divorce Act.

June 17, 2011

Date

Signature of Lawyer

Schedule A to Answer of the Attorney General

1. The Attorney General of Canada opposes all of the relief requested by the Joint Applicants set out in paragraphs 1 to 10 of the Joint Application for Divorce. Moreover, even were the Court to grant all of the relief requested in paragraphs 2 to 10 of the Joint Application for Divorce, the court would not have the jurisdiction to grant a divorce to a couple who are not legally married.
2. The Attorney General's position in respect of the issues raised by the Joint Applicants is as follows:
 - (a) The Superior Court does not have the jurisdiction to grant the Joint Applicants a divorce because, under principles of private international law that apply in Canada, the Joint Applicants are not legally married under Canadian law;
 - (b) In the alternative, granting a divorce to the Applicants would not be a proper exercise of the Superior Court's inherent *parens patriae* jurisdiction;
 - (c) In the further alternative, the Joint Applicants lack the requisite standing to challenge the constitutional validity of the one-year residency requirement set out in sections 2(1) and 3(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.);

(d) In the yet further alternative, the one-year residency requirement set out in sections 2(1) and 3(1) of the *Divorce Act* is constitutionally valid;

3. The Attorney General opposes the bifurcation of this proceeding in the manner suggested by the Joint Applicants in paragraph 8 of the Joint Application for Divorce, namely by having the Court first address the claim for a divorce pursuant to the Court's *parens patriae* power by motion, with the balance of the issues proceeding if the Joint Applicants' motion is not successful. Rather, the Attorney General submits that the Court should first address the jurisdictional issue raised in paragraph 1(a) above by way of motion. If the Attorney General's motion does not succeed, the balance of the application should then proceed on the balance of the outstanding issues.

(a) The Superior Court has no jurisdiction to grant a divorce to the Joint Applicants because they are not legally married under Canadian law.

4. In order for a marriage to be legally valid under Canadian law, the parties to the marriage must satisfy both the requirements of the law of the place where the marriage is celebrated (*the lex loci celebrationis*) with regard to the formal requirements, and the requirements of the law of domicile of the couple with regard to their legal capacity to marry one another.

5. In this case, neither party had the legal capacity to marry a person of the same sex under the laws of their respective domicile - Florida and the United Kingdom. As a result, their marriage is not legally valid under Canadian law.

6. Not being legally married to each other, the Joint Applicants are not "spouses" within the meaning of the *Divorce Act*, and the Court has no jurisdiction to grant them a divorce as it is not legally possible to end a marriage that was void *ab initio*.

(b) In the alternative, this is not an appropriate case for the Court to exercise its inherent *parens patriae* jurisdiction.

7. The *parens patriae* jurisdiction is founded on necessity, namely the need to act for the protection of those who cannot care for themselves (*Re Eve*, [1986] 2 S.C.R. 388).

8. The court's inherent *parens patriae* jurisdiction may be applied to rescue a child in danger or to bridge a legislative gap (*A.A. v. B.B* (2007), 83 OR (3d) 561 at para 27).

9. The Joint Applicants do not fall within the category of persons with respect to whom the Court's inherent *parens patriae* jurisdiction has previously been exercised, i.e. children in danger or persons who need protection who cannot care for themselves. The *parens patriae* jurisdiction should not be extended to gay and lesbian couples who do not meet the residency requirement set out in the *Divorce Act*.

10. There is no legislative gap in the *Divorce Act* that justifies the exercise of the Superior Court's inherent *parens patriae* jurisdiction. Parliament has put in place a one-year residency requirement that applies to all married couples. The fact that the Joint Applicants do not satisfy this requirement and are not in a legally valid marriage does not mean that there is a gap in the legislation. Other remedies are open to them to clarify their marital status under their respective laws of domicile.

(c) In the further alternative, the Joint Applicants lack the standing to challenge the constitutionality of sections 2(1) and 3(1) of the *Divorce Act*.

11. The Joint Applicants lack the standing to challenge sections 2(1) and 3(1) of the *Divorce Act* since they are not directly affected by these provisions. Their inability to obtain a divorce is as a result of the legal regimes of their respective domiciles - Florida and the United Kingdom, which do not grant them the legal capacity to marry of person of the same sex.

12. The ultimate relief that the Joint Applicants seek – a divorce – would ordinarily be sought from and granted by courts of competent jurisdiction in their respective domiciles, but for the fact that these jurisdictions do not recognize the couple as being parties to a legally valid marriage. The Applicants are not without recourse, however, as they can seek orders of nullity from courts of competent jurisdiction in their respective domiciles, because their marriage was void *ab initio*, as a result of the operation of the laws of those respective countries..

(d) In the yet further alternative, the one-year residency requirement set out in section 3(1) of the *Divorce Act* is constitutionally valid legislation.

13. The one-year residency requirement set out in the impugned provisions of the *Divorce Act* violates neither s. 15(1) nor s. 7 of the *Charter*.

14. The one-year residency requirement does not violate s. 15(1) of the *Charter*. It applies to any person seeking a divorce from a superior court in Canada. It is facially non-discriminatory. Nor does it have a discriminatory effect on gay or lesbian couples, as any gay or lesbian couple in a legally valid marriage, whether contracted in Canada

or elsewhere, who meets the requirements of jurisdiction set out in section 3(1) may obtain a divorce in Canada pursuant to the *Divorce Act*. It applies to all married persons seeking a divorce, regardless of sexual orientation.

15. The liberty interest in s. 7 is engaged when state compulsions or prohibitions affect fundamental life choices (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307). Even if it could be demonstrated that this includes the right of Canadian residents to choose to end a marriage through divorce, it does not encompass a right to obtain a divorce from a court in a jurisdiction in which the applicants are not resident.

16. Alternatively, the imposition of a one-year residency requirement is consistent with the principles of fundamental justice.

17. In the further alternative, if the one-year residency requirement set out in the *Divorce Act* is found to be in violation of section 15(1) and/or s. 7 of the *Charter*, it is a justifiable infringement under section 1 of the *Charter*.

Costs

18. The Attorney General does not seek an award of costs for responding to this application.